IN THE

Supreme Court of the United States

October Term, 1978

No. 78-301

EVELYN B. ROSENTHAL, *et al.*,

Petitioners,

v.

BRADFORD TRUST COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The three opinions and orders below, none of which was rendered by the highest New York court from which a decision could be had, are set forth in Petitioners' Appendix at 1a, and are not officially reported other than the initial affirmance by the Appellate Division which is noted at 61 A.D. 2d 1144 (1978).

JURISDICTION

Respondent submits that this Court lacks jurisdiction to hear this matter. Although Petitioners purport to find jurisdiction pursuant to 28 U.S.C. § 1257, they do not come within the terms of those provisions and the petition should be denied.

QUESTION PRESENTED

Where Petitioners have made no effort to request the highest court of a state to exercise its constitutional and statutory discretionary power to review the decision of an intermediate appellate court, which affirmed the lower court's findings of inexcusable default and *res judicata* requiring the dismissal of Petitioners' claims, will this Court review the judgment of the intermediate appellate state court?

STATUTES INVOLVED

Respondent's argument noting this Court's lack of jurisdiction is premised upon 28 U.S.C. § 1257, and New York Civil Practice Law and Rules, § 5602(a), which provides in pertinent part, emphasis supplied:

> § 5602. Appeals to the court of appeals by permission
>
> (a) Permission of appellate division or court of appeals. An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, *or by permission of the court of appeals upon refusal by the appellate division* or upon direct application:
>
> 1. in an action originating in the supreme court, . . .
>
> (i) from an order of the appellate division which finally determines the action and which is not appealable as of right, ...

This statutory provision for discretionary action by the Court of Appeals parallels New York constitutional dictates: N.Y. Const. art. VI, § 3(b)(6), which in addition provides:

> Such an appeal shall be allowed when required in the interest of substantial justice.

Statutes which support the New York lower and intermediate court decisions, assuming they were reviewable here, include U.S. Const. art. IV, § 1 and 28 U.S.C. § 1738, which require that the Maine court proceeding and judgment be binding on Petitioners, who appeared individually and by class representative therein, and N.Y. CPLR § 5015(a) pursuant to which the New York courts denied Petitioners' petition to vacate their default.

ARGUMENT

I

This Court Lacks Jurisdiction to Review the Decision of the New York State Intermediate Appellate Court.

Petitioners brought their action in an inferior New York state court: New York State Supreme Court, New York County. When their action was dismissed by an opinion and order of a justice thereof (Pet. App. 5a-6a), New York State procedure permitted them to appeal to the Appellate Division of the Supreme Court, First Judicial Department, which they did, and the inferior court's orders were unanimously affirmed. Pet. App. 3a-4a. Petitioners then moved in the Appellate Division alternatively for rehearing or for leave to appeal to the New York State Court of Appeals, the State's highest court, and that motion was denied. Pet. App. 1a-2a.

The New York statute explicitly provides in these circumstances[1] that "[a]n appeal may be taken to the court

1. Petitioners never attempted to take an appeal as of right, which would have lain had the Appellate Division's decision directly involved a substantial constitutional question. N.Y. CPLR § 5601(b)(1).

of appeals . . . by permission of the court of appeals upon refusal by the appellate division. . . ." N.Y. CPLR § 5602(a).[2]

Actual practice was recently summarized succinctly by a distinguished Appellate Division justice. Hopkins, *The Role of an Intermediate Appellate Court,* 41 Bklyn L. Rev. 459, 468 (1975).

> The statute that confers the power in most instances allows the litigant denied the right to appeal by the intermediate court to apply again to the highest court.[18] Thus, nothing has been lost if the intermediate court denies the first application for leave to appeal.

18. *See, e.g.,* N.Y. Civ. Prac. L. & Rules § 5602(a) (McKinney 1974)

Petitioners never sought that permission from the Court of Appeals, and thus the highest court of New York State which could have rendered a decision on the propriety of the lower court orders dismissing Petitioners' case was never given the opportunity to rule.

This Court has no power to review any other judgments of the courts of a state than those of the highest court in which a decision in the suit could be had. *Fisher* v. *Perkins,* 122 U.S. 522 (1887). Petitioners improperly invite this Court to assume jurisdiction by exercising an authority which it does not have, that is, to indulge in conjecture as to what would or would not have been the judgment of the New York State Court of Appeals had it been called upon to exert the discretion invested in it by New York State law. *Stratton* v. *Stratton,* 239 U.S. 55 (1915); *Matthews* v. *Huwe,* 269 U.S. 262 (1925). Not only has this Court gen-

2. New York's appellate scheme is consonant with due process. *Javits* v. *Stevens,* 382 F. Supp. 131, 140 (S.D.N.Y. 1974).

erally made clear that the course followed by Petitioners simply has not exhausted all the remedies for review by state courts, it specifically has so ruled with respect to New York State's appellate court procedures. *Southern Electric Co.* v. *Stoddard,* 269 U.S. 186 (1925).

Because the decision of the Appellate Division, First Judicial Department, was not the last state court in which a decision of Petitioners' purported constitutional questions could be had, jurisdiction does not lie and the petition must be dismissed.

II

There is no Substance to the Petition for Certiorari.

Petitioners are members of a class of "B bondholders;" that is, purchasers of $1,150,000 in revenue bonds of 1969, Series B, dated July 1, 1969, of the Development Corporation for Evergreen Valley, Maine. Petitioners seek review here of New York rulings that a decision of the Superior Court of the State of Maine, Oxford County, Docket No. 76-40, in a previously commenced action entitled "Bradford Trust Company, as Trustee, Plaintiff v. The Development Corporation of Evergreen Valley, et al., Defendants," and in which Petitioners' class had participated, was *res judicata* barring a redetermination of their rights against Respondent, successor trustee under the Maine indenture.

In the Maine action Respondent had sought judicial confirmation of its plans for "satisfying any fiduciary obligations it may have to the bondholders."[3] Defendants included the Maine Development Corporation, the Maine Guarantee Authority (a Maine public instrumentality),

3. Complaint (R. 68 below); quoted language is from motion for judgment (R. 78 below) in Maine action.

corporate creditors from Massachusetts, Illinois, and Maine, representatives of the class of "Series A" bondholders, and:

> Eric G. Schweiger of the City and State of New York, and Rudolph F. Perger of the City and State of New York, individually and on behalf of a class consisting of holders and owners of the Revenue Bonds of 1969, Series B issued by The Development Corporation for Evergreen Valley.

On October 19, 1976 Maine counsel wrote to the Maine court:

> This letter will confirm my entry of appearance on this date as counsel of record for those Defendants representing the class of holders and owners of Series B 1969 Revenue Bonds issued by the Development Corporation for Evergreen Valley.

Respondent sought and subsequently obtained from the Maine court an order that directed and approved a disposition of the entire corpus of the trust. The Maine court, after hearing the objections of the B bondholders, approved a disposition which resulted in payment to the A bondholders, but not to the B bondholders. The judgment in the Maine action determined:

(a) that payment of the remaining trust assets by Respondent to the Series A bondholders, rather than to the Series B bondholders, was a valid exercise of Respondent's fiduciary obligations, consistent with the terms of the indenture trust and applicable law; and

(b) that the Maine court had personal jurisdiction over Petitioners Schweiger and Perger "as representatives of a class consisting of the holders and owners of Series B 1969 Revenue Bonds." (R. 60 below).

Petitioners did not appeal the Maine judgment, but in the action below sought to impeach the Maine judgment and to obtain the opposite result: a determination that they had been entitled to a portion of those funds, that the payment to the A bondholders therefore had been improper, and that the Maine court had lacked jurisdiction over them. The determination by the Maine court was not subject to collateral attack in the New York action, because the jurisdictional question had already been litigated and decided in Maine. *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U.S. 522 (1931). All of the petitioners actually appeared in the Maine proceeding through counsel as members of the class of defendants there, after personal service on some of the class, mailed notice to many others, and newspaper publication. They were thus all bound by the Maine judgment, and the New York courts so found, correctly.[4]

The decisions below involved no novel doctrine nor departure from any ruling of this Court. Were the Maine court's finding of its jurisdiction over Petitioners subject to collateral attack in a New York action and available for review here it would be evident that this is merely one of "the vast majority of cases" in which "the fairness stan-

4. The record before the New York courts included the following:

(1) an account of the B bondholders' intention to appear and participate in the Maine action, preamble to Order of October 8, 1976; (2) an entry of appearance by the B bondholders' Maine counsel; (3) motions by the B bondholders, dated October 19 and 27, 1976, alleging lack of jurisdiction over the B bondholders; (4) an account of the hearing which decided the jurisdictional question; (5) the resulting orders denying B bondholders' motions; (6) the Final Order in the Maine proceeding, which explicitly binds the B bondholders to the judgment therein; (7) the B bondholders' motions for relief from judgment, dated December 23, 1976; and (8) the order denying the B bondholders' motion for relief from judgment.

dard" of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945) "can be easily applied." *Cf. Shaffer* v. *Heitner*, 433 U.S. 186, at 211 (1977).

CONCLUSION

For the foregoing reasons Respondent submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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